October 13, 2022

TO: Stephanie Pollack, Deputy Administrator
Federal Highway Administration (FHWA)

FROM: Andrew Stasiowski, President and CEO *Andrew Stasiowski*
American Highway Users Alliance

RE: Docket No. FHWA-2021-0004, National Performance Management Measures; Assessing Performance of the National Highway System, Greenhouse Gas Emissions Measure; Notice of Proposed Rulemaking

The American Highway Users Alliance (the "Highway Users" or "we" or "our") and the organizations listed below respectfully submit these comments on the Notice of Proposed Rulemaking published by the Federal Highway Administration (FHWA) at 87 Fed. Reg. 42401 (July 15, 2022) ("NPRM"). The organizations joining in this submission are: American Bus Association; the American Trucking Associations, Inc.; FP^2; the National Automobile Dealers Association; the Mid-West Truckers Association; and the Maryland Asphalt Association.

Introduction and Overview

The proposed rule would require State Departments of Transportation (DOTs) and metropolitan planning organizations (MPOs) to establish targets for tailpipe CO2 emissions on the National Highway System (NHS). The targets would have to be "declining" targets (i.e., call for reduced levels of tailpipe CO2 emissions from a reference year, using a metric defined by FHWA in the proposed rule), and "demonstrate reductions toward net-zero targets." The proposed reference year is 2021, a year when transportation activity was down due to the COVID virus.

We oppose the proposal. However, should FHWA proceed to adopt a rule in this docket, we offer recommendations to improve it, and mitigate at least some of the difficulties with the proposal.

We note at the outset that these comments concern the rule proposed in this docket. These are not comments on environmental issues generally or on larger issues related to climate change policy. The Highway Users supports the goal of an improved environment, consistent with economic growth and improved highway mobility for people and businesses. But we oppose the proposed rule in this docket.

The Highway Users is the united voice of the motoring public, promoting safe, uncongested highways and enhanced mobility and related benefits for people and business. The Highway Users, a 300-member coalition, includes companies, trade associations, safety advocacy groups, and motoring clubs. Our members represent or support millions of road users from the truck, bus, auto, RV, and motorcycling modes. Our membership includes companies (and associations of companies that, in turn, include many members) that not only use the roads, but comprise

large portions of the economy. They manufacture and/or sell cars, trucks, automotive equipment, fuel, asphalt, concrete, safety equipment, signage, and other products that improve safety and efficiency on the road. Improvements in safety and efficiency, in turn, improve the economy, supply chains, and the quality of life of all Americans.

As set forth more fully below, our key points include –

- FHWA does not have legal authority to impose the rule. In the statutory provision authorizing performance measurement and management, 23 USC 150, paragraph (c)(2) states that USDOT shall "limit performance measures only to those described in this subsection." There is no mention of a "GHG" measure in 23 USC 150(c) and no other words or phrases in the subsection that "describe" a GHG measure.

- GHG tailpipe emissions are already subject to regulation by USDOT and the Environmental Protection Agency (EPA), as well as California and other States that have adopted California's applicable standards.

Should FHWA proceed to adopt a rule in this docket notwithstanding such objections, it should improve the proposal in several ways.

- Amend the target setting provision: to be very clear that only States (and, to the extent applicable, MPOs) have the authority to set the emissions targets, whether declining, unchanged, or even increasing (such as due to economic growth); and to specify that no penalties may be imposed on a State or MPO for not meeting a tailpipe GHG emissions reduction target.

- Calendar 2021 should not be used as the reference or baseline year for measuring tailpipe CO2 emissions and setting targets, as 2021 CO2 tailpipe emissions levels were reduced due to the COVID pandemic.

- The proposed rule focuses on tailpipe CO2 emissions, yet the proposed definition of "greenhouse gas (GHG)" includes additional gases, raising the possibility of additional regulation that is not explained in the NPRM. This overbroad definition should be revised to address only tailpipe CO2 emissions.

- The proposal includes (perhaps inadvertently) an indefensible deadline, for States to submit to FHWA target levels of tailpipe CO2 emissions by October 1, 2022, prior to the comment deadline on the proposed rule (October 13). Any such submission deadline must be pushed back to at least October 1, 2024.

Before elaborating on those and other points, we note some background.

On January 18, 2017, two Administrations ago, FHWA published a final rule that established a performance measure on the percentage change in NHS mobile source CO2 emissions from 2017 (as a reference year) as well as related requirements that States establish and meet targets relative to that GHG measure. 82 Fed. Reg. 5970. In the last Administration, FHWA published a

proposed rule to repeal those GHG performance measurement and management requirements. 82 Fed. Reg. 46427 (October 5, 2017). On May 31, 2018 the last Administration did adopt a rule that repealed the January 18, 2017 rule, and found that the 2017 rule was beyond FHWA's statutory authority[1] while also identifying policy concerns with the rule. See 83 Fed. Reg. at 24920. The proposal in this docket would, in essence, reinstitute the 2017 CO2 performance measurement and management rule but make it more problematic requiring States to set declining (toward net-zero) targets for on-road CO2 emissions on the NHS.

The GHG Performance Management Requirement Lacks Statutory Authority.

The statutory provision authorizing performance measurement and management, 23 USC 150, states at paragraph 23 USC 150(c)(2) that USDOT shall "limit performance measures only to those described in this subsection." (Emphasis supplied).

There is no express mention of a GHG or CO2 performance measure in 23 USC 150(c). Nor is there other language in the subsection that "describes" a GHG measure.

There is, in paragraph (c)(5), express authority from Congress to USDOT to establish measures to "assess … on-road mobile source emissions" for "the purpose of carrying out [23 USC] section 149." 23 USC 149 authorizes the Congestion Mitigation and Air Quality (CMAQ) program, an element of the Federal highway program. The CMAQ program concerns actions with respect to a specific list of pollutants that does not include GHG (CO2).

Further, in both the pending NPRM and the rule developed two Administrations ago (and subsequently repealed), FHWA advises that the basis for its proposed CO2 tailpipe emissions performance measurement and management requirement is not 23 USC 150(c)(5), but 23 USC 150(c)(3). NPRM at 87 Fed. Reg. 42407 and 82 Fed. Reg. at 46431 (2017).

There is nothing in 23 USC 150(c)(3), either, that could fairly be considered to have "described" a performance measurement and management system for GHG (CO2) tailpipe emissions. The words "greenhouse gas," "GHG," "CO2," "carbon dioxide," and "emissions" do not appear in the provision. Nor is there a sentence or phrase in paragraph (c)(3) describing a GHG performance measure or regulation.

23 USC 150(c)(3), claimed as the statutory basis for the proposed rule, concerns establishing certain listed standards "for the purpose of carrying out section 119 [of title 23]." Similarly, the words "greenhouse gas," "GHG," "CO2," "carbon dioxide," and "emissions" do not appear in 23 USC 119. To the extent that FHWA's interpretation is that a GHG performance measure is authorized by the very general reference in paragraph (c)(3) to measures for the "performance" of the Interstate System and the rest of the NHS, the interpretation is far removed from either a description specifically listing GHG or CO2 as a topic for performance measurement and

[1] FHWA wrote in 2018: "… there is no explicit reference to a GHG measure in 23 U.S.C. 150(c). Thus, adoption of a GHG measure rested entirely on FHWA's discretion to interpret 23 U.S.C. 150(c). As discussed in the legal authority section in Section IV.B.1, FHWA has concluded, upon reconsideration, that the better reading of the statute does not encompass the GHG measure." 83 Fed. Reg. at 24932.

management or any other statement that would arguably "describe" GHG as a permissible subject of a performance measure.

FHWA tries to overcome the lack of a description in "subsection" 150(c), by referring to general national goals for the highway program set forth in 23 USC 150(b). Subsection (b), however, does not contain any reference to GHG or CO2 or to GHG or CO2 measures. FHWA notes that "environmental sustainability" is a goal in subsection (b) and, from that, concludes that the reference to "performance" in subsection (c)(3) meets the test of a tailpipe CO2 emissions reduction measure being described in subsection 150(c).

Under such an interpretation, 23 USC 150(c)(3) would appear to be a source of vast authority for regulation, whether of CO2 emissions or other factors not described in its text. This is contrary to the clear directive in 23 USC 150(c)(2) that USDOT shall "limit performance measures only to those described in this subsection." (Emphasis supplied).

Moreover, a general rule in aid of statutory construction is that "the specific governs the general." Morales v. Trans World Airlines, 504 U.S. 374, 384 (1992). Within 23 USC 150(c), paragraph (5) is the provision concerned with "on-road mobile source emissions" and congestion. Rather than respect that Congress had specifically addressed performance measures for on-road mobile source emissions in paragraph (c)(5), FHWA concludes that a very general reference to "performance" plus language not in subsection 150(c) is sufficient to justify measures regarding on-road GHG emissions that are beyond the scope of paragraph (c)(5). The more logical approach, consistent with statutory construction rules, would be to conclude that, within subsection 150(c), Congress expressly stated how to address emissions in paragraph 150(c)(5) and, given the absence of any other "description" in subsection 150(c) of emissions regulation, the rest of subsection 150(c), including paragraph (c)(3), did not provide other authority to regulate CO2 tailpipe emissions.

Consequently, an interpretation that results in regulatory power in USDOT to expand the set of performance measures is contrary to, not merely in addition to, other words that Congress included in 23 USC 150(c). As noted, in subsection 150(c) Congress stated that FHWA shall "limit performance measures only to those described in this subsection." 23 USC 150(c)(2)(C) (emphasis added).

Those are four words of limitation in one sentence!

They must be given weight.

The words "limit" and "only" do not allow, much less encourage an expansive reading of the authority provided to promulgate performance management rules. They direct a limited, narrow reading of the extent to which performance measures are authorized by subsection 150(c). Nor does any word or phrase in subsection 150(c) "describe" a GHG performance measure. FHWA went looking in subsection (b) for a description while Congress specified that only the text of subsection (c) could be the location of a description of an FHWA performance measure, not the full statute or any other subsection.

In short, a GHG (CO2) tailpipe emissions measure is **not** "described" in 23 USC 150 subsection (c), either in paragraph (3) or elsewhere; the proposed rule therefore fails to meet a prerequisite for a performance measure under section 150.

The legislative history of 23 USC 150 supports this conclusion. The section was enacted as part of "MAP-21," Pub. L. No. 112-141 (2012). The Conference Report for MAP-21 described 23 USC 150, which has not been substantively modified since enactment, as follows:

> "Performance measures
>
> "The nation's surface transportation programs have not provided sufficient accountability for how tax dollars are being spent on transportation projects and would benefit from a greater focus on key national priorities. The conference report focuses the highway program on key outcomes, such as reducing fatalities, improving road and bridge conditions, reducing congestion, increasing system reliability, and improving freight movement and economic vitality."

H. Conf. Rep. No. 112-557, to accompany H.R. 4378, at 598 (2012).

While the conference report does say that the listed "key outcomes" from the performance measures program are "such as," conspicuously there is no suggestion whatsoever of a GHG performance measure with targets to reduce CO2 emissions.

For at least all the above reasons, FHWA lacks authority for the proposed rule and, therefore, should not adopt it.

The Supreme Court recently reaffirmed that there must be "clear" authority for an agency to adopt a rule on a "major question." The FHWA's proposal to regulate States to reduce tailpipe GHG emissions would make a major change in a major program, the highway program, without clear authority; so, there is not authority for the proposed rule.

In West Virginia v. EPA, 597 U.S. ___ (2022), 142 S. Ct. 2587, the Court applied the "major questions doctrine" to review of a rule promulgated by the EPA. The Court explained that an agency must point to "clear congressional authorization"[2] for the authority in cases where the "breadth" of the authority claimed and the "economic and political significance" of the asserted authority provide "reason to hesitate before concluding that Congress meant to confer such authority." Id. (slip opinion) at 17 (quotation marks and citations omitted).

Under the proposed rule, FHWA would be able to influence the selection of projects to be undertaken by States with highway formula funds that Congress provides to the States. This would be a major change from today's norm, where formula funds are distributed to States, with States selecting projects pursuant to parameters set forth by Congress. If the proposed rule were

[2] Id. (slip opinion) at 19 (quotations and citations omitted).

to be adopted, States would face pressure to select projects based on whether they would help the State achieve a "declining target" for CO2 emissions – or face potential penalties.[3]

In the FHWA's draft "Summary Report – Economic Assessment for Greenhouse Gas Performance Measure," June 2022 ("Economic Assessment," available in the docket), FHWA states "it is not possible to conclude with any degree of certainty whether and how the [proposed] GHG measure might cause State DOTs and MPOs to make transportation investment and operations decisions that they otherwise would not have made." Id. at 6.
Later on, the Economic Assessment acknowledges that "the rule may result in some offsetting loss of benefits from investment projects that would no longer be pursued, if funds are shifted towards other projects as a result of the rule." Id. at 29.

The NPRM appears to hint that shifts to transit would be a possibility:

> For instance, the construction of a new grade-separated transit facility has the potential to reduce travel on neighboring roadways, which in turn would reduce congestion, improve safety, and reduce criteria pollutant emissions in addition to reducing on-road GHG emissions. NPRM at 42410.

In the development of a transportation bill, such as the recently enacted Infrastructure Investment and Jobs Act (IIJA), one of the important tasks the Congress undertakes is deciding how much funding to allocate for highway programs, for transit, for rail, etc. Transportation program statutes do allow a State some authority to transfer highway funds to transit, but the proposed GHG performance rule would enable administrative change to the choices made by Congress in that regard.

State decisions to change project selection to meet a GHG tailpipe emissions performance target would represent a major change in the nature of the program of Federal assistance to States for highways, where State authority and flexibility to prioritize projects has been a bedrock principle.

The Economic Assessment appears to understate the consequences and the pressure a State could face under the proposed rule. For example, all States strive to achieve economic growth, which is generally associated with an increase in vehicle miles traveled, which tends to generate increased CO2 emissions. To achieve a reduction in CO2 emissions during long periods of substantial economic growth will be challenging at best.

The proposed rule would require that a State must meet a "declining" target for CO2 tailpipe emissions and then goes further, specifying that the declining target must "demonstrate reductions toward net-zero targets." Proposed 23 CFR 490.105(e)(10), NPRM at 42419-20. Thus, FHWA would empower itself to suggest to a State that fails to hit aggressive targets for CO2 tailpipe emissions reduction to adjust the mix of projects selected – or face penalties,

[3] The proposed rule itself does not propose penalty authority or levels, but both the NPRM and the Economic Assessment for the proposed rule volunteer that FHWA has penalty authority elsewhere that could be applied. See NPRM at n.39, 87 Fed. Reg. 42415, and the Economic Assessment at 9.

perhaps including non-approval of projects selected by the State that otherwise would be approved.

FHWA also has significantly underestimated the costs of implementing this major rulemaking in terms of time, resources and opportunity costs. States may well be discouraged from making investments that they prefer in order to pursue projects to achieve "declining" CO2 emissions. The safety, efficiency and other benefits of such other projects are important and the proposed rule appears likely to discourage or delay at least some of them.

Further, and importantly, authorization for a GHG performance measure was debated and not included in 2021's IIJA, H.R. 3684, enacted as Pub. L. No. 117-58, or in 2022's budget reconciliation legislation, known as the Inflation Reduction Act, H.R. 5376, enacted as Pub. L. No. 117-169. The House of Representatives passed H.R. 3684 on July 1, 2021. Express authority for GHG performance measures and targets was set forth in section 1403, but not included in the enacted law.[4] The House also passed budget legislation, H.R. 5376, on November 19, 2021; section 110002 of that bill included express authority for GHG performance measures and targets. Once again, such authority was not agreed to by the Senate and not included in the final law.

Instead, Congress addressed greenhouse gas in other ways, enacting in IIJA new programs with funding, including a carbon reduction program ($6.4 billion over 5 years) and investments in charging stations for electric vehicles (over 5 years $5 billion in formula funds and $2.5 billion in discretionary funds).

This is extraordinarily similar to the fact pattern in West Virginia v. EPA, where the Court noted that Congress had considered and rejected the system of power plant regulation that EPA nonetheless promulgated. See West Virginia v. EPA, slip opinion at 27-30. The Court concluded that Congressional rejection of the regulatory scheme that EPA proceeded to promulgate was an indication that EPA lacked "clear congressional authorization to regulate in that manner." Id. at 28 (quotation marks and citations omitted).

In addition to the close similarity of the pattern of legislative action regarding GHG performance measurement and the circumstances before the Court in West Virginia v. EPA, we presented above numerous reasons why the proposed rule is not authorized. Those same reasons also contribute to a conclusion that the proposed rule lacks "clear" authorization.

Further, as noted above (page 2, infra) the prior Administration closely considered whether FHWA has authority for the proposed GHG performance measure rule and concluded that it does not. The prior Administration's conclusion that there is not authority for the proposed rule is another strong indication that there is not the requisite "clear" statutory authority for such a major change in policy for the highway program as FHWA proposes here.

[4] In addition, at least one amendment was filed during Senate floor consideration of the bill that would have established a GHG performance measure, but it did not receive floor action. S. Amendment 2465, Sen. Cardin, Cong. Rec., August 3, 2021 (daily ed. at 5786).

Accordingly, the proposed rule is not authorized under the major questions doctrine and FHWA should not adopt it.

Tailpipe CO2 emissions are already being regulated by other agencies.

As noted earlier, GHG tailpipe emissions are already subject to regulation by USDOT and EPA as well as California and other States that have adopted California's applicable standards. For example, increased vehicle fuel economy resulting from National Highway Traffic Safety Administration (NHTSA) corporate average fuel economy rules helps reduce tailpipe CO2 emissions.

Vehicles (excluding EVs) directly emit CO2 when operating, while States and others that own and maintain the NHS are not emitters in that capacity (except for minimal emissions from, for example, highway maintenance vehicles). Further, the three components of the proposed GHG emissions performance metric are fuel sales, fuel efficiency factors, and vehicle miles traveled. NPRM at e.g., 42416. State DOTs have limited if any ability to directly regulate or change those variables. In short, regulating States and MPOs is an extremely indirect means of attempting to reduce tailpipe CO2 emissions.

As USDOT, EPA and California (and applicable additional States) are already regulating in this area, and as the impact of any regulation by FHWA of States and MPOs on CO2 tailpipe emissions would be indirect and speculative, FHWA should not adopt the proposed rule.

Should FHWA choose to adopt a rule in this docket, it should first modify the proposed rule in important ways, to mitigate at least some of the difficulties with the proposal.

If FHWA decides to adopt a final rule in this docket notwithstanding our above objections, it should at least modify the rule before it is final, to mitigate at least some of the difficulties with the proposal. We set forth below areas where amendment would be warranted.

Target Setting Must be Reserved Solely to States

The performance measurement statute is clear that it is a "State" that sets targets for performance, not FHWA. 23 USC 150(d) provides –

> "…after the Secretary has promulgated the final rulemaking under subsection (c), **each State** shall set performance targets that reflect the measures identified …" (emphasis supplied).

Under the proposed rule, however, FHWA specifies that the targets must be "declining targets for reducing tailpipe CO2 emissions on the NHS, that demonstrate reductions toward net zero targets." Proposed 23 CFR 490.105(e)(10), 87 Fed. Reg. 42419-20. This proposal leaves a State (or an MPO) with little choice in setting targets. Contrary to statute, under the proposed rule, FHWA is effectively setting the targets (aggressive reduction targets).

In contrast, in Section 24102 of the IIJA, Congress amended aspects of performance measurement and targeting with respect to the programs of grants to States administered by NHTSA. Section 24102 struck a reference in statute to States setting ‘‘annual performance targets’’ and inserted instead ‘‘performance targets that demonstrate constant or improved performance’’. 135 STAT 789.

Clearly, when Congress wants to require States to set targets for constant or improved performance, and not allow targets for declining performance, it knows how to do so and does. But it did not make any such change regarding FHWA performance measurement under 23 USC 150. Yet, FHWA asserts in this NPRM authority to require declining CO2 tailpipe emissions (improved GHG performance) and further constrict a State's discretion by specifying that the State's targets must demonstrate progress towards "net zero." This is contrary to the clear statutory command that "each State shall set performance targets."

The Federal top-down approach to target setting proposed in the NPRM also greatly impinges on the ability of a State to take into account, in target setting for the State, State specific circumstances, such as population growth or economic growth. Such factors likely can receive only limited weight under the proposed rule because FHWA has dictated the general nature of the target that must be set, a declining target moving towards net zero tailpipe CO2 emissions.

Further, as noted above, States have limited if any ability to directly impact the three components of the proposed GHG emissions performance metric -- fuel sales, fuel efficiency factors, and vehicle miles traveled.

As a result, a requirement that States set targets to greatly reduce CO2 tailpipe emissions will present pressure on States to adjust project selection by increasing transit investment, hinted at in the NPRM:

> For instance, the construction of a new grade-separated transit facility has the potential to reduce travel on neighboring roadways, which in turn would reduce congestion, improve safety, and reduce criteria pollutant emissions in addition to reducing on-road GHG emissions. 87 Fed. Reg. at 42410.

Accordingly, if a rule is promulgated in this docket, proposed 23 CFR 490.105(e)(10) must be revised to delete specifications that targets must be "declining" and "demonstrate reductions toward net-zero targets." The revision must not specify what the target must do. Instead, the final rule should expressly establish that "only" the State (or if applicable, an MPO) sets targets and also expressly allow a "State" the authority to set targets for the measure, in this case tailpipe CO2 emissions on the NHS, "whether constant, declining, or increasing."

No Penalties

As set forth earlier at note 3, FHWA has stated that it could use other authority as a basis for imposing penalties on States that do not meet the declining targets largely dictated by FHWA. Imposition of penalties would be, to our knowledge, contrary to practice under the performance management program. To date, when a State does not meet a target, the result is consultation

with FHWA, new target setting and efforts to meet new targets. While not a penalty, such "consultation" gives FHWA an opportunity to work with States, including to adjust the State's program of projects in pursuit of reduced CO2 tailpipe emissions. FHWA's mention of the possibility of penalties injects much more pressure on States into any such consultations. Further, penalties are particularly inappropriate as applied to this proposed rule because, as noted above, States have little ability to take actions that can reduce tailpipe CO2 emissions.

Accordingly, if the proposed rule is to be finalized, a new section should be added to part 490 to specify that that "no penalty may be imposed for failure to meet a target [under the GHG/CO2 tailpipe emissions performance measure]."

The Proposed Use of Calendar Year 2021 as the Reference Year for Measuring Tailpipe CO2 Emissions Should be Changed to 2022 or an Even Later Year.

A rule intended to spur States to reduce CO2 tailpipe emissions must have a reference year against which future emissions levels will be measured, to see if there is a reduction or other change. FHWA proposes to use calendar 2021 as the reference year because, per FHWA, it is the most recent year for which FHWA will have data. See NPRM at 42415.

However, in 2021 economic and transportation activity was reduced due to the COVID virus and the response to it, even though we now approach the end of 2022, a year expected to reflect an increase in vehicle miles traveled (VMT) compared to 2021. Thus, the proposed rule's 2021 reference year would make it extremely difficult for States to achieve a declining target right from the outset.

In contrast, this was not an issue under the rule promulgated on January 18, 2017, two Administrations ago. That rule set 2017, not an earlier year, as the baseline year. 82 Fed. Reg. 5970. That the 2017 data was not yet available did not dissuade the authors of that 2017 rule from using 2017 as the reference year.

In short, if there is a final rule in this docket, the reference year should not be 2021 but 2022 or an even later year.

Limit Definition of GHG to CO2

The proposed rule would require a measurement and targets for tailpipe CO2 emissions. So, it is problematic that the definition of "greenhouse gas (GHG)" at proposed 23 CFR 490.505 is broader than that, and also includes methane, nitrous oxides and unspecified hydrofluorocarbons. The definition further includes the statement that "97 percent of the on-road GHG emissions are CO2." NPRM at 42421 and 42415.

Inclusion in the definition of GHG of emissions other than CO2 is unnecessary to implement a proposal to limit tailpipe CO2, which FHWA says represents 97 percent of the tailpipe CO2 emissions. This overbroad definition might be viewed by FHWA as enabling more regulation without even a rulemaking, as FHWA conceivably could issue guidance or an interpretation

purporting to apply operative requirements with respect to these other emissions – as they would already be in the rule as part of the term "GHG."

The reference to 97 percent of tailpipe GHG emissions being of CO2 is a reason why, if one were to support a GHG performance measurement and management rule, which we do not, it would focus on CO2. It is not a reason to include the sources of the other 3 percent in the definition. It is, to the contrary, a reason to exclude those other gases from the definition. If FHWA should later consider that it wants to regulate with respect to those other emissions, it can begin a new rulemaking and address issues as to its authority and reasons for expanded regulatory at that time.

Accordingly, if there is to be a final rule in this docket, the definition of "greenhouse gas (GHG)" should be revised to refer only to tailpipe CO2 emissions.

No Retroactive Requirements

The deadline for comments on the NPRM is October 13, 2022. Yet the proposed revisions to 23 CFR 490.105 and .107 would establish an October 1, 2022 "reporting date" for information and targets. NPRM at 42412 and 42419. The retroactive date in this provision is hopefully inadvertent and clearly untenable.

If there is to be a final rule in this docket, the reporting dates for the new requirements should begin at least two years later than currently proposed, i.e., no earlier than October 1, 2024, to allow States to begin to implement the new provision before reporting on it.

Conclusion

The Highway Users thanks FHWA for its consideration and recommends that any further action in this docket or on the issues addressed in these comments be in accord with these comments.

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